

BEFORE THE
POLLUTIONS CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DAN HAIRE, WILLIAM AND LINDA
ASMANN, HOUSTON R. COPELAND II,
AND GALORD AND DENNIS MORAN,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, PIERCE
COUNTY, ALBERTSONS, INC., PAT
RAGAN, AND GARY PESSEMIER,

Respondents.

PCHB No. 85-77

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, an appeal of the Department of Ecology's approval of general sewer plan amendments made by Pierce County, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock and Wick Dufford, Members, convened at Lacey, Washington on October 4 and 7, 1985. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21(b).230.

1 Appellants Dan Haire and Houston R. Copeland II appeared and
2 represented themselves. Appellants William and Linda Asmann and
3 Gaylord and Denise Moran did not appear. Respondent State of
4 Washington, Department of Ecology appeared by Charles W. Lean,
5 Assistant Attorney General. Respondent Pierce County appeared by
6 Lloyd P. Fetterly, Deputy Prosecuting Attorney. Respondents
7 Albertsons, Inc. Pat Ragan and Gary Pessemier appeared by their
8 attorney, William T. Lynn. Reporter Gene Barker provided reporting
9 services.

10 Respondent Pierce County moved at hearing for the dismissal of
11 appellants Mr. and Mrs. Asmann and Mr. and Mrs. Moran. The motion is
12 hereby denied on grounds that their failure to appear did not delay
13 the proceedings, that these appellants did not file pre-hearing notice
14 of intent to call any witnesses or offer any exhibits separate from
15 the other appellants, that their co-appellants Mr. Haire and Mr.
16 Copeland called witnesses and offered exhibits and that manifest in-
17 justice would result from their dismissal in these circumstances. See
18 WAC 371-08-165 (3).

19 From all testimony presented by the parties and from all exhibits
20 admitted, the Pollution Control Hearings Board makes these

21 FINDINGS OF FACT

22 I

23 This matter concerns sewer planning and its effects on the quality
24 of the State's waters. The matter arises in Pierce County.

25
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II

Sewer planning by counties is conducted under Chapter 36.94 RCW which requires a "general sewer plan." RCW 36.94.030. This may cover all or a portion of a county. The county's general sewer plan must then be submitted for written approval by the State Departments of Ecology and Social and Health Services. RCW 36.94.100.

III

Our review in this case is of the Department of Ecology's (DOE's) approval of general sewer plan amendments by Pierce County. The criteria under which DOE must make its approval or disapproval is set out at RCW 90.48.110 of the State Water Pollution Control Act:

"No approval shall be given until the commission is satisfied that said plans and specifications and the methods of operation and maintenance submitted are adequate to protect the quality of the state's waters as provided for in this Chapter." (emphasis added)

IV

To implement RCW 90.48.110, above, DOE has adopted regulations at chapter 173-240 WAC. For purposes of this case it is particularly important that DOE has interpreted the statutory term "plans and specifications" in RCW 90.48.110, above, to include three levels of plans moving from the general to the specific. WAC 173-240-010. The first, and broadest, is the "general sewer plan." The next, and more detailed, is the "engineering report." The last, and most detailed is the "plans and specifications."

V

In 1969, Pierce County adopted, with State approval, a general sewer plan for the area south of Tacoma. This is known as the Chambers Creek-Clover Creek Basin ("Chamber's Sewer Plan"). In 1974, Pierce County adopted, with state approval, a general sewer plan for the adjoining area to the north of the Chambers Sewer Plan. This lies east of Tacoma and is known as the Puyallup River Basin ("Puyallup Sewer Plan").

VI

In or just prior to 1984, respondent Albertsons Inc. identified a 13 acre site to Pierce County which it desires to develop into a shopping center. This is located at an exit of State Route 512 (SR 512) which is the multilane, divided highway connecting Interstate 5 and Puyallup. In sewer planning terms, the site is within the Puyallup Sewer Plan quite near the border of the Chambers Sewer Plan.

VII

The Puyallup Sewer Plan contemplates sewer mains running south to north consistent with the topography. These mains would operate by gravity with sewage flow going northward. Service to the Albertsons site via these as yet unbuilt mains would probably entail boring under SR 512, the site being south of it.

VIII

The Chambers Sewer Plan, by contrast, contemplates sewage flow southward. In the 1969 Chambers Sewer Plan the area in question was to have been served initially by an east-west sewer line which then

1 turned southward. The southward sewer line was known as the
2 "Brookdale Trunk Line." This 1969 provision was not explicitly
3 repealed although the inclusion of the area in question within the
4 Puyallup Sewer Plan did so implicitly.

5 IX

6 At the request of Albertsons, the Pierce County Utilities
7 Department requested of the Pierce County Council, in early 1984, that
8 the Albertsons site and its immediate vicinity be removed from the
9 Puyallup Sewer Plan and placed in the Chambers Sewer Plan by amending
10 the boundary. As a matter of perspective, this would mean shifting an
11 area on the order of 1 square mile within the two Plans which together
12 cover on the order of 100-200 square miles. The object of this action
13 was to authorize an east-west sewer line to serve the Albertsons site.

14 X

15 After reviewing an environmental checklist submitted by the
16 Utilities Department, the Pierce County Environmental Official entered
17 a Proposed Declaration of Non-Significance (DNS) under the State
18 Environmental Policy Act (SEPA) on July 3, 1984. The final DNS was
19 published in the SEPA Register maintained in Olympia by DOE, but was
20 not posted or published in a newspaper in Pierce County.

21 XI

22 Pierce County has adopted an ordinance, of which we take official
23 notice, and which provides:

24 Any aggrieved person may appeal the threshold
25 determination or any other decision of the County
26 Environmental Official by filing notice of appeal

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1 with the County Environmental Official and paying
2 \$75.00 appeal fee for thirty (30) days of said
determination. Section 66.02.130(A)

3 Appellants, Mr. and Mrs. Moran, did not receive actual notice of
4 the threshold determination (DNS) within 30 days nor, upon this
5 record, is there any evidence that the other appellants did either.
6 Mr. and Mrs. Moran attempted unsuccessfully to appeal the threshold
7 determination to Pierce County in September, 1984, when they learned
8 of it.

9 XII

10 On November 20, 1984, the Pierce County Council adopted an
11 ordinance amending the Puyallup and Chambers Sewer Plans to place the
12 area in question within the Chambers Sewer Plan. Attached as an
13 appendix was a sketch of the east-west sewer line to serve the
14 Albertsons site and estimates of sewage flow from the site and
15 immediate vicinity. These are rough estimates.

16 XIII

17 On April 12, 1985, after review of the Pierce County DNS and
18 ordinance amending the general sewer plans, DOE approved the
19 ordinance. From this, three appeals were made to this Board on May
20 10, 1985. Respondent Pierce County was joined by Board order.
21 Appellants, Mr. and Mrs. Moran were allowed to intervene as were
22 respondents Albertsons, Inc., Pat Ragan and Gary Pessemier.

23 XIV

24 Pierce County is presently reviewing further amendments to the
25 Chambers Sewer Plan and to land use plans within it.

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1 XV

2 Appellants have not proven that the general sewer plan amendments
3 approved by DOE will render such plans technically infeasible nor for
4 that reason adversely affect the quality of the state's waters.

5 XVI

6 Appellants have not proven that the general sewer plan amendments
7 approved by DOE will render such plans financially infeasible nor for
8 that reason adversely affect the quality of the state's waters.
9 Appellants speculate that the shift of the area in question will lead
10 to higher sewer costs for their own homes under the Chambers Sewer
11 Plan than would have resulted under the Puyallup Sewer Plan. The
12 basis for this speculation is that the east-west sewer under the
13 Chambers Sewer Plan would require some pumping of sewage while the
14 south-north sewer under the Puyallup Sewer Plan would operate, in
15 theory, by gravity alone. Since neither system presently exists, nor
16 have engineering reports been prepared for either, the comparison is
17 difficult to make at this stage of planning.

18 XVII

19 Appellants have not proven that the sewage that would be added by
20 the area in question to the Chambers Sewage Treatment Plant will
21 exceed the capacity of the plant. The evidence on this record is that
22 capacity exists to serve the area in question and others now being
23 considered.

24 XVIII

25 Any Conclusion of Law which is deemed a Finding of Fact is hereby

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1 adopted as such.

2 From these Findings of Fact the Board comes to these

3 CONCLUSIONS OF LAW

4 I

5 This is the review of a decision of the State Department of
6 Ecology rendered under RCW 90.48.110.

7 II

8 Department of Ecology (DOE) has here approved amendments of
9 "general sewer plans" as defined at WAC 173-240-020(f) implementing
10 RCW 90.48.110.

11 III

12 The DOE WAC 173-240-020(f) requires of a general sewer plan that,
13 inter alia:

14 The plan also includes preliminary engineering in
15 adequate detail to assure technical feasibility,
16 provides for the method of distributing the cost
and expense of the sewer system, and indicates the
financial feasibility of plan implementation.
17 (emphasis added.)

18 These are criteria which are directed toward planning for a
19 geographical areas such as encompassed, in this case, by the Puyallup
20 or Chambers Sewer Plant. These areas are global in scope by
21 comparison to the focused area which is the subject of these
22 amendments. We conclude that DOE is correct in its argument set forth
23 at hearing, that an amendment to an existing general sewer plan must
24 not threaten the feasibility of the greater plan. This amendment does
25 not threaten the feasibility of either the Puyallup or Chambers Sewer

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1 Plan. However, the feasibility of the ultimate sewage lines, pumps
2 and other apparatus within the focused area which is the subject of
3 the amendments is not practically ascertainable at this early stage of
4 sewer planning. We conclude that DOE determined technical and
5 financial feasibility correctly so far as this stage of planning is
6 concerned. Its approval was not shown to be inconsistent with Chapter
7 173-240 WAC.

8 IV

9 We conclude that the content of the general sewer plan amendments
10 were adequate, and that DOE did not err in acting upon these despite
11 the pendency of studies which may result in further proposals for
12 general sewer plan amendments.

13 V

14 We conclude that appellants have not shown that DOE's approval of
15 these general sewer plan amendments will result in a violation of the
16 Chambers Sewage Treatment Plant NPDES permit.

17 VI

18 We conclude that DOE has properly discharged its responsibility to
19 protect the quality of the state's waters under RCW 90.48.110 (see
20 Finding of Fact III, above) at this stage of sewer planning.

21 VII

22 Respondents contend that appellants are barred from challenging
23 Pierce County's DNS before this Board for failure to exhaust
24 administrative remedies before Pierce County. Local appeal of a DNS,
25 at the time Pierce County issued this one (July 23, 1984), was

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1 authorized by RCW 43.21C.075(3)(a) which took effect more than a year
2 earlier (April 23, 1983). The newly amended SEPA, of which RCW
3 43.21C.075(3)(a) is a part, was implemented by regulations adopted by
4 DOE (April 4, 1984), also prior to the DNS in question. Those
5 regulations provide for notice of a DNS via posting, newspaper
6 publication or similar methods reasonably calculated to inform
7 interested persons in the place where the matter arises. WAC
8 173-11-340 and - 510. Publication in the SEPA Register on file in
9 Olympia is expressly deemed notice insufficient to meet these
10 requirements. WAC 173-11-510(3). We are aware that Chapter 173-11
11 WAC, though adopted in April, 1984, did not bind local governments
12 until after the DNS in question. WAC 197-11-916. This interim was
13 provided to allow all local governments and state agencies to modify
14 the full expanse of their SEPA rules in view of the SEPA amendments.
15 However, under the doctrine of exhaustion of administrative remedies
16 we must review procedure to determine whether appellants have had a
17 fair opportunity to exhaust the remedy. Gardner v. Pierce Co., 27
18 Wn.App. 241 (1980) and Zylstra v. Piva 85 Wn.2d 743 (1975). See also
19 Ferry v. Bellingham, 41 Wn.App. 839 (1985). In doing so we find that
20 the only notice given of the DNS, on this record, was publication in
21 the SEPA Register in Olympia. We conclude that such notice was not a
22 procedure which provided a fair opportunity to commence a local appeal
23 of the DNS and that our review is not precluded.

24 VIII

25 Appellants have not shown that the DNS issued by Pierce County was
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1 erroneous. While we do not regard the general sewer plan amendments
2 as being a mere boundary change, nevertheless, the sewer line
3 proposals contained within the preliminary engineering available at
4 this time leave the consequences of the ultimate development difficult
5 to assess.

6 IX

7 As noted in Finding of Fact IV, above, DOE has implemented its
8 sewer planning review statute, RCW 90.48.110, by adopting three phases
9 of review. SEPA review may also be phased. Cathcart v. Snohomish
10 County, 96 Wn.2d 201 (1981) and WAC 197-11-060(5). This opinion is
11 not dispositive of the action which DOE or Pierce County might take at
12 the next phase which involves an "engineering report." This phase is
13 more detailed than the present "general sewer plan" phase.

14 X

15 It is apparent, however, that appellants and other citizens
16 residing within the affected area are concerned over the comparative
17 cost of sewers as between themselves and Albertsons under (a) the
18 former general sewer plans and (b) the new general sewer plans as just
19 amended. It seems justifiable that local government would grant such
20 a comparison as soon as sufficient detail can be obtained about the
21 proposed and alternative sewers. Moreover, we note that an
22 engineering report calls for "an estimate of the costs and expenses of
23 the proposed facilities and the method of assessing costs and
24 expenses." WAC 173-240-060(3)(p). Further, SEPA seeks to "fulfill
25 the social, economic and other requirements" of Washington citizens.

1 RCW 43.21C.020(1)(c). SEPA may therefore require an assessment of th
2 comparative socio-economic aspects of a proposal when its consequences
3 are, or should be, known. Barrie v. Kitsap Co., 93 Wn.2d 843, 858-861
4 (1980). An economic comparison may also be set forth in other
5 documents aside from SEPA. See WAC 197-11-448(4). The rendering of
6 an economic comparison may or may not change the direction of sewer
7 planning in the affected area. It would, however, provide a superior
8 underpinning for whatever ultimate decision is made.

9 XI

10 Any Finding of Fact which is deemed a Conclusion of Law is hereby
11 adopted as such.

12 From these Conclusions of Law the Board enters this
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ORDER


The Department of Ecology approval of general sewer plan amendments by Pierce County is hereby affirmed.

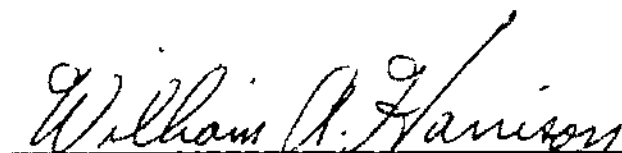
DONE at Lacey, WA this 26th day of November, 1985.

POLLUTION CONTROL HEARINGS BOARD

 11/25/85
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member


WILLIAM A. HARRISON
Administrative Appeals Judge